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No. 01-1736

Supreme Court, U.S.
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In The

Supreme Court of the United States

NICHOLAS PANARELLA, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT

Petitioner Nicholas Panarella, Jr., filed a timely Petition for a Writ of Certiorari on May 24, 2002, seeking this Court's review of whether a private citizen with no disclosure obligations may be convicted of being an accessory after the fact to a scheme to defraud the public of honest services in violation of 18 U.S.C. § 1343 when the alleged honest services fraud consisted solely of a public official's uncharged concealment of his lawful business relationship with the private citizen without misuse of office. Br. in Support of Petition for Writ of Cert. at 1 [hereinafter, "Petition"]. The Brief for the United States in Opposition to that Petition [hereinafter, "Brief in Opposition"], filed on July 29, 2002, notes that on July 3, 2002 the United States Court of Appeals for the Second Circuit ordered rehearing *en banc* for *United States v. Rybicki*, 287 F.3d 257 (2d Cir. 2002). *See* Br. in Opposition at 11-12.

A party may file "a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing" or may file a reply brief "addressed to new points raised in the brief in opposition." SUP. CT. R. 15.6, 15.8. Pursuant to those Rules, Petitioner addresses in this brief the new arguments raised by the Solicitor General pertaining to the Second Circuit's July 3, 2002, grant of rehearing *en banc* for *United States v. Rybicki*, 287 F.3d at 257.

I. THE SECOND CIRCUIT'S DECISION TO GRANT REHEARING *EN BANC* TO THE PANEL DECISION IN *UNITED STATES V. RYBICKI* DOES NOT DIMINISH THE CONFLICT AMONG THE CIRCUITS REGARDING THE PERMISSIBLE SCOPE OF HONEST SERVICES FRAUD

As described more fully in both the Petition and in the Brief in Opposition, Petitioner, a private citizen, was convicted of being an accessory after the fact, 18 U.S.C. § 2, to a scheme to defraud the public of the honest services of a Pennsylvania State senator, Joseph Loeper, in violation of 18 U.S.C. §§ 1343, 1346. Pet. at 4-6; Br. in Opposition at 2-4. According to the Superseding Information that formed the basis of this conviction, Senator Loeper improperly failed to disclose payments received pursuant to a lawful consulting relationship with Petitioner and subsequently enlisted Petitioner's assistance in misleading a reporter regarding these payments. *United States v. Panarella*, 277 F.3d 678, 681 (3d Cir. 2002). Petitioner contended before the United States Court of Appeals for the Third Circuit that his conviction was improper because the Superseding Information failed to allege a crime. *Id.* at 682.

Following the Third Circuit's affirmance of the conviction, the Petition before this Court sought review of this issue because of the growing divergence among the various federal circuits regarding the permissible scope of honest services fraud. Petitioner described recent decisions by the Second Circuit that have increasingly limited the meaning of "honest service fraud"; in particular, on one occasion, the Second Circuit found 18 U.S.C. § 1346 unconstitutional as applied and reversed the conviction at issue. *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002); *see*

also Pet. at 11. Shortly after the *Handakas* decision, the Second Circuit ruled in *United States v. Rybicki*, 287 F.3d at 257, that honest services fraud must include a reasonably foreseeable risk of economic or pecuniary harm to the victim that is more than de minimus. *Id.* at 260, 266; *see also* Pet. at 15-16. *Rybicki*, however, affirmed the appellant's conviction. *Rybicki*, 286 F.3d at 260.

In arguing that this Petition should not be granted, the Solicitor General's Brief in Opposition contended that there is no true conflict among the circuits. Br. in Opposition at 7-12. While Petitioner respectfully disagrees with the Solicitor General's interpretation of the appellate decisions to which both briefs refer, Petitioner acknowledges that, pursuant to this Court's Rules, enlargement of arguments previously articulated in the Petition itself would be inappropriate. SUP. CT. R. 15.6, 15.8. However, the Brief in Opposition particularly emphasized the Second Circuit's recent line of cases and contended that the *Rybicki* decision could not establish a conflict among the circuits warranting a grant of the Petition because, "Even if there were a conflict between the decision in this case and *Rybicki*, that conflict would not warrant this Court's review at this time because the Second Circuit recently voted to rehear *Rybicki* en banc to consider whether Section 1346 is unconstitutionally vague on its face. 7/3/02 Order, *United States v. Rybicki*, Nos. 00-1043, 00-1044, 00-1052, 00-1055." Br. in Opposition at 12.

The Second Circuit's decision to rehear *Rybicki en banc*, however, does not constitute a reason to reject the Petition. First, as described in the Petition itself, Pet. at 10-18, numerous other appellate courts besides the Second Circuit have taken divergent approaches to honest services

fraud: whether or not the Second Circuit affirms *Rybicki*, reverses *Rybicki* in light of *Handakas*, or rejects both *Handakas* and *Rybicki*, those divergences will still exist. *See* Pet. at 13-17 (describing different approaches). In particular, the divergence between the Third Circuit's approach in *Panarella*, 277 F.3d at 678, *see* Pet. at 12-13, and those of the Seventh Circuit and the Fifth Circuit will remain unaffected. *Id.* at 13-17 (addressing, *inter alia*, *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998) (permitting conviction only upon a showing of misuse of office), and *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (requiring proof of a state law violation prohibiting more than an appearance of impropriety)).[1]

More fundamentally, however, acceptance of the position articulated in the Brief in Opposition would place petitioners in an untenable situation. At most, a petition for certiorari must be filed no more than ninety days following the denial of a timely petition for rehearing *en banc*. SUP. CT. R. 13. A petitioner may not wait until all potentially relevant litigation in every circuit is resolved before seeking this Court's review, and, indeed, this Court's Rules make no provision for such a tactic. Assuming *arguendo* that the Second Circuit's *en banc* resolution of the *Rybicki* decision would be dispositive in assessing

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[1] Moreover, regardless of any coincidental equivalence in sentence length between the possible state and charged federal crime in this matter, Br. in Opposition at 13, the ongoing divergence among the circuits will continue to implicate federalism issues apart from *Rybicki*'s outcome. In particular, private citizens will continue to face potential federal felony liability in some jurisdictions, state misdemeanors in others, and no criminal liability at all in still others for the same conduct.

whether a conflict among the circuits exists, this would counsel in favor of deferring consideration of this Petition until that time. It does not, however, counsel in favor of rejecting the Petition entirely, particularly when doing so would prejudice the Petitioner's ability to raise these issues before this Court. Indeed, the existence of an arguable divergence in approach within the Second Circuit, between two cases decided within a month of each other, only highlights the confusing and uncertain state of law in this area and the need for this Court to rule definitively on the scope of honest services fraud pursuant to the federal mail and wire fraud statutes.

CONCLUSION

For the foregoing reasons and for the reasons articulated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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September 12, 2002